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IN THE

Supreme Court of the United States

October Term, 1970

PASQUALE ROMANO,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement and Previous Proceedings

Petitioner seeks a Writ of Certiorari in order to review an order of the Court of Appeals of the State of New York, dated July 2, 1970 (26 N.Y. 2d 894), which affirmed an order without opinion of the Supreme Court of the State of New York, Appellate Division, Second Department, dated January 27, 1969, which in turn affirmed without opinion a judgment of the Supreme Court of the State of New York, Kings County, entered on May 26, 1967,* convicting petitioner after a jury trial of the crimes of Burglary in the

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* The judgment of conviction entered on May 26, 1967 was entered pursuant to a writ of error coram nobis so that petitioner could reinstate his appeal from a prior judgment dated December 17, 1951.

Third Degree and Grand Larceny in the First Degree and sentencing him as a second felony offender to 18 to 20 years in prison.

Jurisdiction

The jurisdiction of this Court is sought to be invoked under 28 U.S.C. Section 1257 (3). Petitioner claims his fifth, sixth and fourteenth amendment rights were violated because he had not obtained the final day's transcript of a previous mistrial, because his attorney failed to secure those minutes and he also claims a comment on his failure to testify was made.

Statement of Facts

Julius Lewis testified that together with his partner he was engaged in the retail fur business under the name of Lewis Brothers, 8010—Fifth Avenue, Brooklyn, New York. That on September 11, 1950, before leaving the premises for the evening, he securely locked the premises (6).* The building was 40 x 100, and on the premises was a vault for the storage of furs (8). He received a call after he had left the premises and returned to the premises at about 8:30 A.M. the following morning (9). When he arrived at his place of business, he saw *police inside* the building. He observed a hole in the roof of the extension at the rear building, approximately 2 x 3' (10); some tools near the fur vault and the dial and knobs of the vault were on the floor (9). The tools did not belong to him. The building was equipped with a burglar alarm system, but the break in the roof would not activate the alarm (11). The sum of

* References are to stenographer's trial minutes.

$1200 in cash was taken from the cash register (15) as well as a mink cape and one mink scarf, valued at about $1,000.00. He did not know the defendant and did not give him permission to break into the premises (16).

Cross-Examination

Mr. Lewis testified to the location and construction of the building. The fur vault tampered with was located in the front of the premises (17). To get onto the roof of the extension from the inside of the premises, there was a ladder located in a workroom of the building (19). However, to get onto the roof of his building from the outside, it would be necessary to climb over some rear fences and then by climbing over adjoining roof, proceed to his building where the roof was broken (23). The witness was cross-examined at length on the location and construction of the building in relation to other buildings in the immediate vicinity.

He identified a blueprint of the premises, showing a layout of the store and the three buildings (Deft's Ex. 1 in Evidence).

Ernest Amodeo testified that on September 11, 1950 he was assigned to the 64th Precinct and was the recorder of a police radio car. His tour of duty on this day was midnight to 8 A.M. Premises 8010-5th Avenue was within the jurisdiction of the 64th Precinct. Sometime that morning a signal 32 came over the radio, indicating prowler in the rear of premises, 8010-5th Avenue. The police car at the time was approximately three or four blocks away from 8010-5th Avenue (26). They proceeded to 80th Street (26). He went to 80th Street (26) and his partner went around on 5th Avenue to cover that side of the premises (26). He proceeded to the rear of several houses to investigate

the rear of the premises described in the signal (26). To get to the roof of the extension of premises 8010-5th Avenue, he climbed up a telephone pole. As his head got above the roof he observed three men on the roof of one of the garages (26). The three men were several feet away from the burglarized premises (50). He flashed his search light at the three men and as he did so "one of them hollered, 'Beat it,'" and they dispersed—they ran. They jumped off this roof (27, 35, 40). *"This defendant ran in my direction, and I singled him out of the lot at that time prior to his jumping off the roof"* (35). It was a moonlight night (33). The defendant jumped off the roof and ran in the direction of 81st Street. He climbed down the pole, reentered the police car and continued his search in the area of 80th Street and Fourth Avenue. At a point on 80th Street and Fourth Avenue, he noticed two men running out of the driveway on the South side of 80th Street and cross over to the North side of 80th Street (51). *He recognized the defendant running on the South side to the North side of 80th Street* (62, 63). He stopped the car, ordered them to halt (28) and fired his gun in the air. The defendant fell to the sidewalk while the other person escaped through a driveway on the northerly side of 80th Street (28). He went over to the defendant, and ordered him to get up from the sidewalk (28). The defendant was bleeding from his hands and face. With the defendant, he proceeded to investigate the rear of the buildings, in an effort to apprehend the other person. He was unsuccessful in the search and with the defendant returned to the street, at which point the defendant said to him *"Give me a break—I was only the lookout." At that point he offered me $150 to let him go.* He refused the bribe. He had the defendant

covered at all times with his service revolver (28). He asked the defendant "Are you hurt? Do you want an ambulance? Have you been shot?" He said "No, I am not shot; I am all right". He refused aid (29).

Detective Sullivan called as a People's witness testified that he assisted in the arrest of the defendant (66). While cruising with Detective Deane, received a signal 32 call over the radio and proceeded to premises 8010-5th Avenue, Brooklyn. He got out of the car, went to the burglarized premises at which time he heard several gunshots coming from the rear of premises 8010-5th Avenue. He proceeded in the direction where the shots came from, and saw Patrolman Amodeo with the defendant as his prisoner. Appellant was bleeding from the face and hands. The following morning he returned to the burglarized premises and observed various tools near the vault.

POINT I

The petitioner's constitutional rights, under the due process and equal protection clauses of the Federal and State Constitutions, were not violated by the State's failure seventeen years ago to provide him with the complete record of the mistrial.

The petitioner was indicted and charged with the crimes of Burglary 3rd degree and Grand Larceny 1st degree. Petitioner was arrested on September 12, 1950 and arraigned on the following day. At his arraignment he was represented by *retained* counsel, William W. Kleinman. Mr. Kleinman represented petitioner at his first trial which after a five-day trial ended with a "hung" jury and a mistrial was declared.

During the first trial retained counsel entered into an agreement with the official Court reporter, Ralph Roberts, to purchase and pay for a daily copy of the testimony. Petitioner paid for and received the daily copy of the minutes for March 28th, 29th, April 1st and April 2nd. Thereafter, this agreement was cancelled, either for non-payment or because Mr. Kleinman no longer desired the minutes. The balance of the minutes were never transcribed. Obviously, the trial had ended and no further need existed for additional minutes. The Court and District Attorney were not parties to this agreement.

The first trial having ended in a mistrial, no appeal lies from such determination.

Section 456 of the New York Code of Criminal Procedure provides as follows:

> "Stenographic minutes of trial or hearing; when to be furnished: expense.
>
> "In any case when defendant is *convicted* of a crime * * * the clerk of the Court in which the conviction was had shall *within two days after a timely notice of appeal* shall be served upon him, notify the stenographer that an appeal has been taken. Within two days after receiving such notice the stenographer shall make and file in the office of said clerk, two copies of transcripts of the stenographic minutes of the entire proceedings of the trial or hearing certified by the stenographer as accurate transcripts of such proceeding. Such transcripts shall be filed by the clerk in his office . . . " .

The filing of the transcript of the minutes by the official Court reporter is not required unless defendant duly appeals from the judgment of conviction (*People* v. *Scharaga*, 45

N.Y.S. 2d 343), and the transcript may not be delivered to a defendant except by order of the Appellate Division (*People* v. *Teams*, 38 Misc. 2d 328). The minutes must be retained for two years (Judiciary Law Sec. 297).

After the mistrial the case was remanded for trial. The case then appeared on the trial calendar on the following days:

"5/21/51	Ready and passed 5/28 DA's request.
5/28 51	" " " off—counsel engaged.
9/24/51	" " " 9/26
9/25/51	" " "
9/26/51	" " "
9/27/51	" " " —Atty. Kleinman withdrew —passed to 10/3/51 to secure attorney.
10/ 3/51	Ready and passed. Atty. to be assigned—passed to 10/8/61.
10/ 8/51	Read and passed to Oct. 15/51—to be tried.
10/15/51	Ready and passed to Oct. 22 by the deft. Atty. for deft. just secured minutes from previous trial.
10/22/51	Ready and passed.
10/23/51	On trial.
10/24/51	On trial. Verdict of jury; Guilty as charged Burg. 3d and G.L. 1st".

From April 3rd to September 27th petitioner was still represented by Mr. Kleinman as retained counsel. Thereafter Mr. Kleinman withdrew as counsel and Nathaniel Kramer was assigned by the Court. The record discloses that from April 4th to October 23rd, when the second trial commenced, *no mention was made by petitioner or his attorneys for the balance of the original trial testimony.* The

Court reporter who recorded the first trial was also the stenographer on the second trial.

At the second trial petitioner was represented by assigned counsel Nathaniel Kramer. When the second trial began petitioner stated "I cannot get a fair trial without the first minutes" (3). The following discussion took place at the bar outside the hearing of the jury (12-14).

> "The Court: (To the official stenographer) Mr. Roberts, you are familiar with the matter of the minutes of the previous trial, are you not?
>
> The Stenographer: Yes.
>
> The Court: What transpired with reference to these minutes?
>
> The Stenographer: On the previous trial the minutes were furnished overnight to the District Attorney and to the Court; and Mr. Kleinman, who was representing the defendant, was allowed to use a third copy while the trial proceeded. Prior to this trial, *when Mr. Kramer was assigned, Mr. Kleinman purchased the copy of the minutes which he had used on the first trial and turned them over to Mr. Kramer for use on this trial.*
>
> Mr. Kramer: I have them.
>
> The Court: So that you have the minutes, Mr. Kramer?
>
> Mr. Kramer: *I have the minutes. I have the blueprints,* and *I have as much as I could possibly get.*
>
> The Court: In other words, there is absolutely no merit to the outburst of the defendant?
>
> Mr. Kramer: Except that he is prejudiced because you would not do what he wants you to do; that is all. That is all he says, that you are prejudiced against him.
>
> The Court: I am just not concerned now—I am not concerned with his ranting— I am concerned about the minutes. You do have the minutes?

Mr. Kramer: I do have the minutes.

The Court: There is no merit to his claim that he has not the minutes?

Mr. Kramer: Of course. I have the minutes."

It is not denied that a defendant in a criminal case has a right to be confronted by his accusers and to an adequate defense. Petitioner contends however that without the complete transcribed minutes of the mistrial, he cannot effectively cross-examine the People's witnesses nor take advantage of existing inconsistencies of those witnesses. We do not disagree with this statement of the law. However, it does not go far enough. It omits the pertinent observation that impeachment of a witness may be achieved by calling as a witness anyone who heard the prior testimony. Thus a juror, witness, attorney or the court reporter is a competent witness. Petitioner could have called as a witness his former retained counsel, William W. Kleinman and the Court Reporter Ralph Roberts, as witnesses to prove any inconsistencies in the testimony of the People's witnesses (*McRorie* v. *Monroe*, 203 N.Y. 426; *Forsberg* v. *U.S.*, 351 F. 2d 242; *Nickens* v. *U.S.*, 333 F. 2d 808, cert. den. 379 U.S. 905).

This Court under this point is told that by reason of the action of the Court and District Attorney in 1951, in denying him a complete record of the mistrial, that such action deprived him of a fair trial. To sustain his allegations, petitioner relies upon reported cases decided many years after the judgment of conviction in this case.

These authorities with which we are all acquainted with, enunciated drastic changes in the law affecting the trial of

criminal cases which were unheard of in 1951. The new rules established by these cases are unprecedented and specific. It is those recently adopted rules of law upon which petitioner's alleged grievance under this point is based. He seeks reversal of the judgment of conviction on the ground that the trial judge in 1951, did not comply with the mandate enunciated in these cases. In effect, he is claiming that the trial Judge, prosecutor and assigned counsel committed error in not anticipating that this case would be reviewed seventeen years later on legal principles not in existence at that time.

Defendant argues that those doctrines require that the prosecutor and Court must always be prepared to provide the defense with such minutes whenever a case goes to trial —without "reasonable notice" by the defense—at the People's expense. Failure for any reason to deliver these minutes, petitioner contends, constitutes a denial of a constitutional right. This contention is not a reasonable interpretation of *People* v. *Rosario*, 9 NY 2d 286 and *People* v. *Montgomery*, 18 NY 2d 993.

It should be observed that the conviction in this case occurred on October 24, 1951 approximately nineteen years ago, before *People* v. *Ballott*, 20 N.Y. 2d 600 (1967) and the other cited authorities were decided, and upon which the petitioner relied in arguing that he was deprived of his right to due process and the equal protection of the laws, guaranteed by the Federal and State Constitutions.

At the outset it is our considered opinion that these cases should not to be applied retroactively. The New York

Court of Appeals has repeatedly affirmed the doctrine that new principles of law, constitutional or otherwise, will not be applied retroactively (*People* v. *Morhouse*, 1 N.Y. 2d 451; *People* v. *Sayers*, 22 N.Y. 2d 571 (decided 7/2/68); *People* v. *Boone*, 22 N.Y. 2d 476 (decided 7/2/68; *People* v. *McQueen*, 18 N.Y. 2d 337; *People* v. *Rivera*, 16 N.Y. 2d 879).

As Chief Judge Desmond noted in his concurring opinion in *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64 at page 78, there is clear precedent in New York for prospective application of new rules of Law. He stated:

> "For these reasons I vote for a declaration that such divorces are void, *but I am not bound to and do not vote to give this ruling any more than prospective effect. I cannot shut my eyes to the realities.* Tens of thousands of such purported divorces have been granted to New Yorkers who acted on advice of attorneys who relied on 25 years of decisions by the New York lower courts. *No social or moral purpose would now be served by ruling that marriages long ago dissolved are still in existence, and the result would be destructive to the present homes, marriage and lives of those who remarried on the strength of Juarez decrees. This court has a clear right to give our ruling prospective effect only* (see *Lyon* v. *Richmond*, 2 Johns Ch. 51; *Harris* v. *Jex*, 55 N.Y. 421; *Great Northern Ry. Co.* v. *Sunburfst Oil & Refining Co.*, 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360; *Linkletter* v. *Walker*, 85 S. Ct. 1731) and justice and fairness dictate that we should do so and refuse to allow these plaintiffs or others to attack collaterally such past-rendered Mexican 'one-day' divorces." (Emphasis supplied)

Assuming however, that the new principles are applicable, the issue, therefore, is whether it was reversible error to deny petitioner the minutes of the Mistrial for the purpose of cross-examination at trial where the minutes *had not been transcribed by the court stenographer* and paid for, *and no prior request for the minutes had been made.*

The determination of this issue depended below upon the ruling of the Court of Appeals in *People* v. *Rosario*, 9 N.Y. 2d 286, as modified by *People* v. *Montgomery*, 18 N.Y. 2d 993. The Court of Appeals held that *People* v. *Rosario*, *supra*, is prospective and not retroactive in its application and petitioner therefore was not entitled to the minutes of the Mistrial.

In *People* v. *Rosario*, defense Counsel requested an inspection of prior statements given by prosecution witnesses, after each concluded his direct testimony at the trial, for impeachment purpose. The Trial Court in accordance with *People* v. *Walsh* examined the statements first and permitted defense counsel to use only those portions of the statements containing inconsistencies.

This Court wrote at page 451,

> "It is our conclusion therefore that the trial judge should have turned over to the defendant the requested statements in their entirety. In this instance, though, we deem it not amiss to consider whether the ruling which he made prejudiced the defendant, whether, in other words, there was a rational possibility that the jury would have reached a different verdict if the defense had been allowed the use of the witness' prior statements. (See People v. Kingston, 8 NY 2d 384, 387, 208 NYS 2d 956, 959; People v. Jackson, 7 NY 2d 142, 145, 196 NYS 2d 79, 81;

People v. Mleczko, 298 NY 153, 162-163, 81 N.E. 2d 65, 69.) We believe not."

"This court is exceedingly slow to disregard error as harmless under section 542 of the Code of Criminal Procedure, particularly in a capital case. However, in the one before us, we are as convinced as judges of any real inconsistency between prior statement and trial testimony, that the jury would not have decided the case differently even if defense counsel had had the use of the statements in question. In other words, it may not be said that any substantial right of the appellant was prejudiced by the trial court's erroneous ruling."

The Court, while ruling that it was error not to have delivered the statement to the defendant, by affirming the judgment of conviction, nevertheless decided that its holding was prospective only and not retroactive. The Court found that since there was an overwhelming proof of guilt and an absence of any real inconsistency between the prior statements and the trial testimony, likely to persuade the jury to decide the case differently, that "no substantial right of the appellant was prejudiced by the trial Court's erroneous ruling."

We wish to point out that in *Rosario, supra,* the statements in question *were available at trial. In the case at bar the Minutes had not been transcribed and were not available at trial.*

In *People* v. *Jaglom*, 17 N.Y. 2d 162, decided 1966, involved was the right of defense counsel to inspect the Grand Jury Minutes of a People's witness for the purpose of cross-examination, where the Grand Jury Minutes *had not* been transcribed at trial. They were not transcribed because

the defense refused to pay the cost of transcription and there was no claim of indigency.

The Court of Appeals by a four to three decision affirmed the conviction. The majority wrote: at p. 164.

> "Although in *People* v. *Rosario*, 9 N.Y. 2d 286, 213 N.Y. 2nd 448, 173 N.E. 2d 881, we held that the defense had a right to examine prior non-confidential statements, *the decision in that case does not forbid the imposition of conditions that are reasonable.*" (emphasis supplied).

The Court further noted that Section 952-t of the Code of Criminal Procedure makes it the obligation of the Grand Jury stenographer to furnish *only* such transcripts of the Minutes to the District Attorney "as (he) shall require," and that there are a multitude of cases where the District Attorney does not require the Minutes in order to prosecute. With respect to all indigent defendants, the majority wrote that "those portions of the Minutes which he requests must be paid for by the people." And with a solvent defendant, "He ought to give *reasonable notice* to the District Attorney and pay the charges of the stenographer." (p. 165).

It is significant that while the minority in *Jaglom, supra*, states that the payment of the cost of transcription should not be imposed as a condition for production, even for solvent defendants, it nevertheless agreed with the majority as to "*reasonable notice*" writing:

> "The danger of fear of an undue burden being imposed upon District Attorneys is minimized by *requiring the defendant to advise the District Attorney in advance of trial, of an intention on his part*

> ***to request examination of testimony of any prosecution witness who had testified before the Grand Jury."***

Thus, if defendant in this case seventeen years ago was unable to pay the cost of transcription, they should have been paid by the State, but this did not excuse his failure to give "reasonable notice" to the District Attorney in advance of trial. Except for the payment by the State for the Minutes, an indigent's rights are no greater than those of a solvent defendant. The Court in *Jaglom, supra,* makes clear beyond doubt that the imposition of *"reasonable notice"* in advance of trial applies to all defendants, without regard to their financial condition.

The "reasonable notice" rule, enunciated in *Jaglom, supra,* was reiterated by a majority Court in *People* v. *Montgomery,* 18 NY 2d 993-995, where the Court wrote:

> "When a defendant requests a transcript and when that request is accompanied by an affidavit of indigency, the State must honor the request. *We add one caveat.* The request for a transcript should be made far enough in advance of trial to give the State a reasonable amount of time to transcribe the minutes and to avoid the necessity of suspending the Trial pending the production of the transcript."

The Court by this decision indicated that no distinction be made between a defendant's request for such a transcript and the transcript of Grand Jury Minutes.

In *People* v. *Ballott,* 20 NY 2d 600, the lower Court denied defendant's application for an adjournment of one week for the purpose of raising the sum of $50.00 needed to purchase the minutes of the first trial. The Court of

Appeals reversed the lower Court holding that the *denial of defendant's application before trial was an abuse* of discretion.

The Court citing with approval *People* v. *Rosario*, *People* v. *Montgomery* and *People* v. *Jaglom*, again firmly established the "reasonable notice" rule in *People* v. *Ballott*, *supra*, stating:

> "In a case such as the present—where the first indictment had been dismissed because of insufficient evidence of identity and the first trial had resulted in a mistrial because the jury had been unable to agree on a verdict—the defendant's need for the minutes of the earlier trial is particularly obvious. Under the circumstances, the defense was "entitled" to procure the testimony previously given by the witnesses who were again to testify against him in order to enable him to conduct an effective cross-examination. See, e.g., *People* v. *Rosario*, 9 N.Y. 2d 286, 289; *People* v. *Malinsky*, 15 N.Y. 2d 86, 90). Without such testimony, a defendant is deprived of a substantial right. And, where he is an indigent, the State must make that testimony available to him. (See *People* v. *Montgomery*, 18 NY2d 993; *People* v. *Jaglom*, 17 N Y 2d 162, 165; *Williams* v. *United States*, 358 F. 2d 325 (9th Cir.); *People* v. *Miller*, 35 Ill. 2d 615.)."

The Appellate Division in *People* v. *Shorts*, 27 A.D. 2d 660, followed the "reasonable notice" rule first enunciated in *Jaglom* and thereafter in *People* v. *Montgomery*, *supra*, where by a unanimous Court, it was held *not* reversible error to deny defendant's request to inspect the former testimony of a named police officer, since:

> "The request was not made until the officer was being cross-examined; the prior testimony (as in the instant case) had not been transcribed and was not in the possession of the District Attorney."

It is clear from these decisions that the procedural requirement of "reasonable notice" in advance of trial applies equally as well to indigent as to solvent defendants. Petitioner has no absolute Constitutional right to a transcript of the mistrial, and under the facts of this case, the action of the Court nineteen years ago, cannot be construed as a denial of the defendant's constitutional rights to due process and the equal protection of the law.

The record demonstrates clearly that the defendant failed to make any request "far enough in advance of trial to give the State a reasonable amount of time to transcribe the minutes and to avoid the necessity of suspending the trial pending the production of the transcript" (*People* v. *Ballot*, 20 N.Y. 2d 600; *People* v. *Montgomery*, 18 N.Y. 2d 993; *People* v. *Jaglom*, 17 N.Y. 2d 162, 165).

The law does not mandate upon the state an absolute requirement that in every case where a prior hearing was had or a mistrial, that before the defendant can be tried, these minutes must be furnished to him by the State. Such a requirement is not mandatory and may be waived by failure to meet the procedural requirement of "reasonable notice."

If this Court were to lay down a flat rule, that the present judgment is void for failure of the People and the Court seventeen years ago to deliver the minutes of a former trial to the petitioner, it would be imposing upon the Prosecutor and the Court, a duty that our highest Court did not see fit

to impose. To hold that Courts and Prosecutors should have anticipated the establishment of these rules would be wholly unrealistic.

It is also suggested that in view of the recent decision *People ex rel. Cadogan* v. *McMann*, 24 N.Y. 2d 233, a case which respondent contended below controls this one, the matter of retroactivity in this regard has been settled. The question of minutes of a prior mistrial is not an essential of the fact finding process and the recent decisions are not to be applied retroactively.

POINT II

Petitioner was adequately and effectively represented by assigned counsel at the trial.

Petitioner charges his assigned Counsel with incompetency during the trial. The allegations of incompetence stems from the statement of assigned counsel "that he had the *complete* transcript when such was not the fact" (p. 37—Ap. brief). Trial counsel never stated to the Court that he had the "complete transcript of that mistrial". He received from petitioner's *retained* counsel, William W. Kleinman only that portion of the minutes purchased by petitioner. This is borne out by his statement to the Court as it appears on page 13, "I have the minutes. I have the blue prints and *I have as much as I could possibly get*". This statement by counsel was an honest statement of fact. He knew from his many years of experience as a criminal lawyer, that appellant *then* was not entitled to the balance of the minutes without first paying the court stenographer his legal fee.

Because Mr. Kramer answered that he had the minutes, petitioner now claims that counsel was unprepared and as a consequence he was denied his constitutional right to adequate and effective representation. In the light of the law as it existed nineteen years ago, there is no reason for now assuming that trial counsel was unprepared and therefore incompetent. The case presented a simple statement of facts and no difficult or unusual questions of law. It was not surprising that counsel answered that he was prepared to proceed with the trial. He had the minutes of the mistrial consisting of 205 pages of testimony which contained therein the People's case and part of the defense. He had available a record which was sufficient to permit him to conduct a meaningful cross-examination. The record of the trial discloses that this experienced and able lawyer conducted a lengthy and thorough cross-examination of the People's witnesses. We find under these circumstances no merit to petitioner's claim of prejudice based upon the fact that he did not have the complete minutes of the mistrial.

The real attack on assigned counsel is his lack of visionary power to see into the future and discern on the coming horizon the cases which have been decided since the determination of this case nineteen years ago and which have materially affected criminal procedure. We can say without fear of contradiction that no-one then could have foreseen the trend of our Appellate Courts. To accuse an attorney of incompetency when a span of years has elaborately and definitively extended the "archaic" processes of the law is unreasonable indeed. Practicing attorneys are not required to prognosticate upon the events of the future when Courts themselves have been found wanting and have even failed to speculate by means of dicta, infrequent in

depth dissenting opinions and even simple footnotes. The approach of Brandeis and Cardozo have not been made applicable because of the failure of Courts to extend themselves beyond the issues of the facts before them.

There is no question that the petitioner was entitled to the conscientious services of adequate and competent counsel. The test, however, is whether the alleged incompetency of counsel deprived him of his right to adequate representation as to make his conviction a mockery of Justice (*United States* v. *Wright*, 176 F. 2d 376; *People* v. *De Bernardo*, 169 Misc. 563).

In *Diggs* v. *Welsh*, 148 F. 2d 976, cert. den. 375 U.S. 889 the Court in passing on the quality of representation wrote:

> "There must be 'effective' representation. We are aware that if that word be construed in a broad and liberal sense it would follow that on habeas corpus the court would have to review the entire trial and consider all the alleged mistakes, failures to object to the introduction of evidence and errors in advice which the ingenuity of a convict could set down on paper during the enforced leisure of his confinement.
>
> "It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effective-

ness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear."

* * * * *

"For these reasons we think absence of effective representation by counsel must be strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it. We do not believe that allegations even of serious mistakes on the part of an attorney are ground for habeas corpus standing alone. The cases where the Supreme Court has granted habeas corpus on the ground that there was no fair trial support this interpretation of the absence of effective representation. They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice" (669-670).

In *People* v. *Tomaselli*, 7 N.Y. 2d 350, 356, it was stated:

"In short, there is denial of effective representation of counsel only when the representation given is so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of it and correct it.

Indeed, to hold otherwise would require a rule that a conviction must be vacated solely on the ground that assigned counsel was negligent or otherwise at fault in performing his duty. Although we do not condone or make light of an alleged failure on the part of any lawyer to serve his client adequately, it furnishes no basis either in reason or authority for setting aside a judgment."

While a defendant is entitled to effective assistance of counsel the Court does not act "as surety for the proper performance of counsel's professional duty" (*People* v. *Tomaselli, supra*). A defendant is entitled to competent counsel but not to infallible counsel (*People* v. *Girardi*, 2 A.D. 2d 701).

In *People* v. *Brown*, 7 N.Y. 2d 350, the defendant alleged that he had an eye-witness to the crime whom his court-assigned counsel refused to use as a witness. Defendant also claimed that there was "a strong indication of conspiracy between the defense counsel and prosecuting attorney". In denying coram nobis, the Court said:

> "Coram nobis may not be availed of to remedy counsel's negligence or error of judgment. It would be folly indeed for the courts to sit and hear disappointed prisoners try their form lawyers on charges of incompetent representation. Absent evidence that the trial judge appointed an attorney who was unfit to defend the accused or that the judge allowed counsel to continue to act after it appeared that his representation was such as to make the trial a farce and a mockery of justice, the fact, if it was one, that assigned counsel made an error of judgment or of tactics during the course of trial is an insufficient ground for coram nobis and, this being so, it would be futile to have a hearing. This conclusion, far from being 'a retreat from the positions taken' in other cases (dissenting opinion, p. 361), is but an application and reaffirmation of the settled rule that, if the defendant would not be entitled to relief even if the allegations of his petition were to be established, further judicial investigation would be pointless. The courts below were, therefore, justified in denying the application without granting a hearing." (p. 361).

Although in *Brown* and *Tomaselli* the Court dealt with cases involving assigned counsel, the principles enunciated therein apply equally as well to retained counsel (Cf. *People* v. *Hernandez*, 8 N.Y. 2d 345). Mistake of judgment are made by retained counsel as well as by assigned counsel. "We simply examine all of the factors, whether during the trial or before plea and determine whether the aid and assistance of counsel was of such *substandard* level as to be open to collateral attack via coram nobis on the ground that petitioner was deprived of his constitutional right to effective assistance of counsel (*People* v. *Fryson*, 36 Misc. 2d 73)".

Petitioner's conclusory allegation of incompetency on the part of assigned counsel, lacking substantiation in the conduct of the trial, is insufficient to overcome the presumption that the defendant was adequately represented (*People* v. *Tomaselli*, 7 N.Y. 2d 350).

Petitioner also accuses trial counsel of incompetency in announcing before the jury "I asked this defendant to take the witness stand" and when appellant refused, assigned counsel again asked in the presence of the jury, "Do you want to take the stand" (p. 26 of Ap. Brief). Counsel for petitioner would have us believe that serious prejudicial error resulted from his *overt* refusal to take the stand. This occurred in response to assigned counsel's suggestion that he offer controverting testimony to the prosecution's case. It might be in order to review briefly the People's case which confronted the defendant, and which caused counsel to make the suggestion that appellant take the stand in his own behalf. At the conclusion of the People's case, the evidence showed that (1) on the day in question at about 2:30 A.M. the defendant with two others was surprised by the

police on a roof close to the burglarized premises (2) that appellant jumped off the roof and ran away and (3) when apprehended had blood on his hands and face and stated to the arresting officer *"Give me a break—I was only the Look-out" and offered the policeman a $150 bribe to let him go.* While assigned counsel cross-examined the witnesses at length, the basic evidence against the defendant was not controverted. Upon this state of the record, it is only fair to assume that such request was founded upon counsel's intensive examination of the positive merits and absolute need of a defense, to avoid a judgment of conviction by default. Counsel's tactical decision must be judged in the light of his opinion that evidence offered by petitioner himself would be to his advantage.

It is a long tested rule of law that the prosecution may not comment or draw any unfavorable inferences from the defendant's failure to take the stand. Upon this basis, whether defendant chose to stand *mute* or decided *to actually utter his unwillingness* to render testimony in the open courtroom, it still follows that no adverse interpretation of his refusal could be made. We may, however, indulge in a permissive inference, by reason of counsel's insistence that petitioner take the stand, that it was his *best judgment* that any testimony given by the defendant from the witness stand, *would have inured to his best interests.*

The judgment of assigned counsel is now attacked as a sheer indication of gross incompetency. This conclusion is made after the passage of nineteen years and at a time when counsel who is now deceased, cannot defend his reputation and actions in this case. The accusation against Mr. Kramer we submit "reflects the benefit of hindsight em-

ployed from this vantage point taken long after the close of the trial" (*People* v. *Fernandez*, 301 N.Y. 302, 329).

The claimed ineptness of Mr. Kramer in proceeding to trial without the complete record of the mistrial and requesting that the petitioner take the stand in the presence of the jury, was not of such character to have rendered the trial a farce and a mockery of justice. The judgment of assigned counsel as evidenced by his conduct of the trial under the facts and circumstances and the law existing at that time, and not as critically reviewed by hindsight, which is the yardstick being used by the petitioner, did not deprive the defendant of a fair trial and is an insufficient reason to reverse the judgment of conviction.

As was said in *United States* v. *Sumpter*, 111 F. Supp. 507, 511:

> "Petitioner was entitled to a fair trial. He was not entitled to a flawless trial. He was entitled to reasonably competent counsel. He was not entitled to infallible counsel. Sumpter had the benefit of more than reasonably competent services and also the devotion of a loyal advocate."

And as was said in *United States ex rel. Feeley* v. *Ragen*, 166 F. 2d 976:

> "The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate the trial unless on the whole the representation is of such low caliber as to amount to no representation and to reduce the trial to a farce."

A conscientious and able lawyer should not be condemned or criticized on so flimsy a basis as is here advanced by petitioner.

POINT III

Petitioner received a fair and impartial trial. The statement of the Court criticized was a proper answer to the uncontrolled actions of this defendant and was not prejudicial to the petitioner. In any event, there was no exception to the statement.

Petitioner again persists in criticizing an isolated extract from the record in violation of every principle of fairness to the trial Judge. When the statement of the Court, *to which no objection was made by trial counsel*, is read in context, its fairness is apparent. It is elementary that whatever a Court does or says during a trial must be read together (*People* v. *Koenig*, 180 N.Y. 155, 161; *People* v. *Johnson*, 185 N.Y. 219, 232).

Petitioner's argument that the Court's threats and admonitions in the presence of the jury to take the stand (87-89) and the directive to petitioner's counsel "to call his client" (88) if he wished to, were all a direct, deliberate, prejudicial denial of petitioner's Fifth Amendment right to refuse to testify is unfounded and baseless in fact. The statement of the Court must be considered in the light of the circumstances at the time of the comment. We set forth herein part of the record (pp. 87-90), which will clearly demonstrate that the comment of the Court was called for by the uncontrolled outbursts by petitioner (pp. 87-90).

> "Mr. McGough: The people rest, if your Honor pleases.
>
> The Court: The People rest.
>
> Mr. Kramer: The defendant at this time respectfully moves to dismiss the indictment on the ground that the people have failed to establish by sufficient

proper evidence, an issue to be determined by the jury.

The Court: Motion denied. You may proceed.

The Defendant: Your Honor—

The Court: Wait a moment, please, just a moment.

The Defendant: Your Honor, I want to say something—

The Court: Just a moment.

The Defendant: I wouldn't take the stand now.

The Court: *Be silent, please. Do not disturb the trial. If you want to make some statement, I will permit you to make a statement, but not in the presence of the jury. If you want to say something, I will send the jury out, unless you want to make a statement from the witness stand and then the jury must be here to hear what you have to say. Mr. Kramer, if your client wants me—*

The Defendant: I told you yesterday I was one—

The Court: Please behave yourself.

The Defendant: You don't want to give me a fair trial.

The Court: You are admonished to keep quiet. Mr. Kramer, call your client if you wish to.

The Defendant: I am not going to take the stand.

The Court: You may proceed, Mr. Kramer.

Mr. Kramer: It is up to the defendant.

The Court: I cannot hear you.

Mr. Kramer: I have asked this defendant to take the witness stand.

The Court: That is between you and your client.

Mr. Kramer: I have no other evidence to offer.

The Court: I am sorry. That is between you and your client. I am not instructing you or suggesting what you should do; that is entirely between you and your client.

Mr. Kramer: Do you want to take the stand?

The Defendant: No, you are trying to railroad me.

The Court: Just a moment, Mr. Kramer, please.

Mr. McGough: The People rest.

The Court: You may proceed.

Mr. Kramer: The defendant will rest.

The Court: All right, do you renew your motions?

Mr. Kramer: I renew my motion made at the end of the People's case.

The Court: Your motions are denied. How long do you wish for summation?

Mr. McGough: I would like about a half hour at least.

The Court: You may proceed, Mr. Kramer, and sum up your case.

Mr. Kramer: I would rather go over to two o'clock.

(There was an outburst from the defendant which was unintelligible to the Reporter.)

Mr. Kramer: I am sorry.

The Court: I am sorry too. Let us proceed in an orderly way.

Mr. Kramer: I am trying to, your Honor.

The Defendant: Your Honor, I want it on the record—

The Court: Behave yourself.

The Defendant: That I demand a fair trial.

The Court: Please behave yourself.

The Defendant: It is not a fair trial. I can't get a fair trial.

The Court: I admonish you to behave yourself.

(There was another outburst from the defendant which was unintelligible to the Reporter.)

The Court: *Do not pay any attention to this, Gentlemen of the jury. Do not pay any attention to that at all. Now, Mr. Kramer, when do you want to sum up?*

Mr. Kramer: At two o'clock."

There was no exception to the remark of the Court, nor was there a motion for a mistrial. Counsel for petitioner recognized that the comment was precipitated by the outbursts of petitioner.

The right to a fair trial does not include the right to deliberately accuse the Court of unfairness by conduct calculated to obstruct the orderly administration of Justice. *United States* v. *Bentvena*, 319 F2. 916 cert. den. sub nom. *Ormento* v. *United States*, 375 U.S. 940; *United States* v. *Aviles*, 274 F2. 179; *People* v. *San Souci*, 23 AD 2d 352; aff'd 17 N.Y. 2d 684. There exists in the Court the inherent power to preserve order and decorum in the Courtroom and to protect the rights of the parties and witnesses and thereby further the administration of Justice. (*People* v. *Jelke*, 308 NY 56). The Court, the target of petitioner's unjustified abuse and criticism, with tact and patience, attempted to calm and control the actions of the petitioner. The trial judge was cognizant of the fact that to permit the petitioner to continue with these outbursts would in the end prejudice his rights before the Jury. *Immediately after these outbursts, the Court properly warned the jury "Do not pay any attention to this, Gentlemen of the Jury. Do not pay any attention to that at all."*

The Court again in its charge to the Jury admonished them that:

"The defendant is presumed to be innocent (p. 98). That is a valuable and important right that belongs to this defendant and to every defendant regardless whether he behaves himself on a trial or is as boisterous as a man can be." (p. 98)

* * * * *

"The defendant is at no time called upon to establish his innocence or to offer his evidence concerning his innocence or tending to establish his innocence. That is the Law of our State, and I say again that the Law applies to this defendant regardless of his conduct here, regardless of who and what he is, and applies to every defendant regardless of that defendant's conduct or station of life." (p. 99)

"This defendant did not take the witness stand. Please do not concern yourself for one moment with any outbursts on his part and what he shouted from his seat at the Counsel table. The Law with reference to that feature of the case is as follows: the defendant had a right to take the witness stand and to testify in his own behalf. But his failure or neglect to take the witness stand does not create any unfavorable influence against him." (p. 114)

"Gentlemen of the Jury, you are in duty bound to accept the law as I give it to you." (p. 103)

"A decent citizen accepts the Law that is given to him by the Court, honestly and conscientiously for under our system of jurisprudence, the Court is supreme upon all matters of Law." (p. 103)

The Court acted with propriety in its attempt to control the outbursts of the petitioner and the comment of the Court did not constitute prejudicial error requiring a reversal of this Judgment.

Self created and self-invited error gives the defendant no standing to claim prejudice. (*People* v. *Foster*, 19 NY2d 150, 153; *People* v. *Randall*, 9 NY 2d 413, 425; *People* v. *Marks*, 6 NY 2d 67, 68; *United States* v. *Secondeno*, 347 F2d 725, 726.

CONCLUSION

The petition for the writ of certiorari should be denied.

Dated: Brooklyn, New York
December 21, 1970.

Respectfully submitted,

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